IN THE SUPREME COURT OF FLORIDA

No. 81,467

DOM MIELE and SHIRLEY MIELE,
Petitioners - Appellants,

v.

PRUDENTIAL-BACHE, ET AL.,
Respondents - Appellees.

ON CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No. 92-2334
USDC No. 91-150-CIV-FTM-15D

REPLY BRIEF OF APPELLANTS

GRADY & ASSOCIATES, L.P.A.
Thomas R. Grady, Esq.
3411 Tamiami Trail, North
Suite 200
Naples, Florida 33940
(813) 261-6555

Attorneys for Appellants Dom and Shirley Miele

June 21, 1993

TABLE OF CONTENTS AND CITATIONS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This Reply Brief is submitted on behalf of appellants, Dom and Shirley Miele (the "Mieles" or the "Appellants"), in further support of their appeal from the March 10, 1992 opinion and order (the "Order") of the Honorable William J. Castagna of the United States District Court for the Middle District of Florida. The Order purported to confirm the award of the arbitrators in favor of the Appellants but nonetheless ordered that a portion of the funds awarded to them be paid instead to the state of Florida in reliance upon FLA. STAT. §768.73.

In the Answer Brief of Prudential-Bache Securities, Inc., Roger Jones and Doug Haas (the "Appellees"), the Appellees raised no issue that was not anticipated and largely refuted in the Mieles' initial brief. Those arguments will not be repeated here.

In the Amicus Curiae brief of the Department of Banking and Finance (the "Department") in support of Prudential-Bache, the Department espouses several novel theories not addressed by the district court's opinion or the decision of the United States Court of Appeals for the Eleventh Circuit which certified the question to this Court. The Mieles believe that their initial brief nonetheless largely anticipated the general argument of the Department. Although more distractions than anything else, a few of the Department's arguments warrant reply.

Neither the Department or the Appellees addressed the issues raised in the Mieles' initial brief and chose instead to urge, largely without relevant authority, that the statutory construction offered by the Mieles is incorrect because such a construction would violate public policy because it would decrease state revenues. Alternatively, in other *non sequitur,* Appellees argue (as expected) that arbitration proceedings somehow become "civil actions" in the event a confirmation proceeding (which is not required in order to obtain satisfaction of an award) is

commenced. The Appellees and the Department are both overreaching and their strained conclusions must be rejected.

ARGUMENT

A. Contrary to the Assertion of the Department, Public Policy Strongly Supports Arbitration and Alternative Dispute Resolution Forums; Consistent with this Policy, Statutes Designed to Avoid Perceived Litigation Inefficiencies and Juror Emotion Have No Application to Arbitration

In its Amicus brief, the Department devotes the majority of its effort to its strained argument that public policy supports the application of FLA. STAT. §768.73(2) to arbitration proceedings. To be perfectly blunt, the Department is saying little more than that it would like the state to receive the additional revenues that it believes would result from a determination by this Court that the statute applies to arbitration proceedings. While the Department's desire for additional revenue is not relevant to this appeal, even assuming that additional revenue would result (an unlikely scenario[1]), the entire premise for its argument is misplaced.

The Department argues that ". . . claimant's [sic] will be encouraged to avoid complying with Section 768.73(2) merely by choosing arbitration." While an arbitration claimant's motivation is not relevant to the determination of legislative intent or statutory construction, this statement evidences the Department's inability to genuinely respond to Mieles' initial brief. As

---

[1] As emphasized in the Initial Brief of Appellants at pages 29 through 31, it is clear that the only beneficiary which would result from the application of §768.73 to arbitration awards is the securities industry. This is especially true in light of the Appellees' argument that an arbitration *only becomes* a civil action for purposes of this statute *after* a confirmation proceeding is initiated. Prior to that time, the parties are presumably free to negotiate the terms of a settlement short of seeking confirmation which results in the payment of a lesser amount by a brokerage firm to the prevailing customer - and the state receives nothing.

the legislature observed in enacting Florida's Tort Reform Act, runaway jury verdicts and the incredible expense and delay associated with litigation in court are what prompted change. Claimants are encouraged to choose arbitration not to avoid complying with §768.73(2) but to avoid the very same problems identified by the legislature in enacting that statute. Of course, an additional flaw in this entire assertion is that the Department apparently assumes that a securities claimant has the right to choose arbitration as opposed to some other forum. As discussed below, that assumption is false.

Moreover, the common sense of any practicing trial attorney confirms that the likelihood of a substantial punitive damages award is far greater in a jury trial than before a panel of experienced arbitrators, one of whom is required by rule to be a member of the very industry on trial. *E.g.*, American Arbitration Association, *Securities Arbitration Rules*, Rule 13. Thus, if maximizing punitive damages is the factor in forum determination, claimants and their counsel would always choose jury trials over arbitration.

However, the reality in the securities industry is that *claimants do not have a choice* as to arbitration versus jury trial. In order to do business with any major brokerage firm today, including Appellee Prudential-Bache, a customer must execute a pre-dispute arbitration agreement which prevents that customer from filing a lawsuit in court. Clearly, the securities industry is similarly aware that punitive and other damages are far less likely to be awarded in an arbitration than in a lawsuit tried by jury. A smaller percentage of a larger damage award would be more desirable for both securities claimants who have been defrauded by securities brokers as well as the state of Florida seeking to maximize its revenues and regulate the

securities industry. The truth is, punitive damages are awarded less frequently in arbitrations than in jury trials and, when awarded, tend to be smaller and entirely justified.[2]

B. The Department and the Appellees Avoid Entirely Any Discussion of the Procedures in Arbitration Which Make Application of FLA. STAT. §768.73 Utterly Impossible in an Arbitration Context; In Such Context, the Statute Would Be Impossible to Apply and Would Lead to Unconscionable Results.

As discussed extensively in the initial brief of Appellants, it would be utterly impossible to apply FLA. STAT. §768.73 to arbitration awards given the present rules observed in such proceedings.[3] For example, it would be necessary to maintain formal and complete records of arbitrations in order for reviewing courts to determine whether an award of punitive damages was reasonable or whether an award was based upon a particular type of tort where recovery is limited or defined under the statute. Similarly, arbitrators would be required to render a detailed written verdict containing specific findings of fact and conclusions of law in order to allow for appropriate judicial review in the context of §768.73. The Florida legislature surely did not intend (nor would it be permitted) to impose on arbitrations conducted pursuant to the Federal Arbitration Act, the various rules of procedure, evidence and other formal requirements

---

[2] In this case, according to the district court, the arbitrators awarded punitive damages in an amount equal to compensatory damages. Arbitrator awards of punitive damages are far from excessive and do not present the problem perceived by the legislature when tackling tort reform. *See,* PIABA'S 1991 REPORT ON PUNITIVE DAMAGES IN SECURITIES ARBITRATION. In contrast, appellate courts have often confirmed judgments resulting from jury trials which contain punitive damages in amounts greatly exceeding the compensatory damages. *E.g., Aldrich v. Thomson McKinnon Securities, Inc.*, 756 F.2d 143, 149 (2d Cir. 1985) (punitive damages awarded by jury in the amount of $3,000,000 where $175,000 in compensatory damages awarded were reduced to $1.5 million or approximately eight times compensatory damages). Query whether a successful arbitration claimant could petition a Florida court pursuant to Chapter 768 for additur in the even the punitive damages portion of her award appeared grossly inadequate (as contrasted with the remittitur ordered in *Aldrich*).

[3] *See Initial Brief of Appellants* at 23 - 31.

currently found only in court. *See, United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361 (1960); *See Initial Brief of Appellants* at 26.

In enacting Florida's Tort Reform Act, it is clear that the legislature did not seek to discourage the use of alternatives to the resolution of disputes by judge or jury. By procedurally handicapping arbitrators and imposing formal judicial procedures in circumstances such as those before this Court, arbitration will become nothing less than a full blown trial - with business persons substituted for trained judges and juries but without formal discovery. At that point, there will be absolutely no incentive to utilize arbitration and, indeed, jury trial and the supposed increase in likelihood of substantial punitive damages verdicts will aggravate the very problem sought to be alleviated by the legislature in enacting this law.

The Department attempts to rely on *Insurance Company of North America v. Acousti Engineering Company of Florida*, 579 So.2d 77 (Fla. 1991) as somehow supporting its notion that §768.73 was meant by the legislature to apply to arbitration proceedings. Its reliance is misplaced. This Court in *Acousti Engineering* held that arbitrators could *not* award attorneys' fees *even where a statute provided that a court could do so. Id.* at 80. This Court did hold that parties to an arbitration proceeding should be entitled to recover attorneys' fees incurred in those proceedings where the legislature has determined that a court has the authority to award attorneys' fees had those proceedings taken place in court. However, this Court held that the arbitrators themselves could not award such attorneys' fees; to the contrary, an application must be made to a court in order to obtain such an award. Clearly, both this Court and the legislature

knew and understood the significance of the different meaning between courts and arbitrators in connection with the issues which this Court confronted in *Acousti Engineering*.

If the terms "arbitrator" and "court" or "civil action" are truly synonymous and interchangeable (as urged by the Department and Appellees), this Court could reach no decision other than to hold that arbitrators can assume any of the rights and responsibilities previously reserved to the courts by the legislature. All an arbitrator must do is substitute "arbitrator" for "judge" in determining the scope of his newly broadened powers. Perhaps arbitrators will even be able to assemble for the purpose of reviewing decisions of other arbitrators - or courts - in furtherance of their exercise of judicial powers.

This Court should halt speculation in this area and avoid allowing this snowball to gain momentum as it travels down the slippery slope leading only to more of the very problems sought to be ameliorated by the Tort Reform Act. FLA. STAT. §768.73 may be constitutional as applied to civil actions but has no application to an arbitration proceeding.[4]

C. Arbitration Proceedings Are Entirely Independent of Civil Actions and Satisfaction of Arbitration Awards Does Not Require Judicial Participation; Thus, While A Court May Exercise Its Ministerial Power in Confirming An Award Upon Request of a Party Owning An Arbitration Award, Such a Proceeding is Not Mandatory and In No Way Causes FLA. STAT. §768.73 to Apply to Arbitration Awards.

The only argument asserted by the Appellees in furtherance of their position is essentially that an arbitration award is a civil action because a civil action *may* be filed to confirm an

---

[4] Indeed, the legislature was put on notice as early as 1986 that there was at least some question as to the applicability of §768.73 to arbitration awards. *See, Peabody v. Rotan Mosely, Inc.*, 677 F.Supp. 1135 (M.D. Fla. 1987). Although the statute has been amended as recently as 1992, no effort has been made by the legislature to expand the application of this statute to arbitration awards. It seems clear that the legislature is not concerned about applying this statute to arbitration, a forum designed to overcome the very problems responsible for enactment of this statute in the first place.

arbitration award. Equally helpful is the observation by the Department that a "civil action" in court to confirm an arbitration award is a "civil action." Obviously, a "civil action" is a "civil action;" however, the filing of a civil action to enforce an arbitration award resulting from a completed arbitration does not transform an arbitration proceeding *which is already complete* and which has resulted in such an award into a "civil action."[5] This strained argument is without merit on its face for at least two simple reasons.

First, the filing of an action of any kind does not change the underlying nature of the dispute. For example, filing a civil action complaining of the tort of conversion does not make the tort itself a civil action. Similarly, a civil action filed pursuant to the Federal Arbitration Act to compel arbitration pursuant to an agreement between the parties where the underlying claims arise out of the federal securities laws does not result in a civil action having been filed which pertains to federal securities laws. Indeed, a federal court requires an independent basis for jurisdiction under the Federal Arbitration Act and, although the essence of the claims may themselves be sufficient to invoke federal question jurisdiction if they were the subject of the civil action, the civil action filed to compel arbitration is an entirely separate animal and the underlying federal securities claims do not give rise to federal question jurisdiction. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981 (5th Cir. 1992) (Customers' underlying federal

---

[5] It is for perhaps this reason that both the Department and the Appellees studiously avoided the Mieles' reference in their initial brief to the definition in BLACK'S LAW DICTIONARY of "civil action." While both the Department and the Appellees hang their hats on the definition of "civil action" in that dictionary, they both avoid offering the definition of "action" which is of course how "civil action" is defined. The Mieles have already provided this Court with this complete reference and a thorough analysis regarding BLACK'S definition. *See Initial Brief of Appellants* at 19, 20.

securities claims did not supply a basis for jurisdiction over their petition to compel arbitration pursuant to the Federal Arbitration Act).

Second, if this argument is correct, it would result in separate treatment for two separate classes of prevailing parties in arbitration. The first class would consist of those persons fortunate enough to obtain payment pursuant to the terms of their arbitration award without having to confirm that award in court. In securities arbitration, this is the norm rather than the exception.[6] The second class would consist of those persons forced to seek judicial confirmation of arbitration awards in order to reduce those awards to judgment and attempt to execute on that judgment. There is no constitutionally permissible reason to create two separate classes of arbitration parties with the result that one class is forced to pay homage to the state while another class is entirely free not to do so.

Finally, the Appellees boldly argue that "there is no contract right to punitive damages, [and therefore] punitive damages could not have been within the contemplation of parties when the contract was entered into." Very much to the contrary, parties may by contract agree to arbitrate claims, as they did in this case, before the AAA. In doing so, it is clear "that AAA arbitrators may grant any remedy or relief including punitive damages." *Lee v. Chica*, 983 F.2d 883, 887 (8th Cir. 1993); *see also Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063 (9th Cir. 1991) and *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988). Thus, the Mieles indeed have precisely what the Appellees argue they do not: a contract right

---

[6] The rules of the self-regulatory organizations which are applicable to all securities broker/dealers provide that arbitration awards shall be honored by cash payments to the prevailing party upon receipt of those awards. *See, Initial Brief of Appellants* at 12, n.5. Thus, especially in the context of securities arbitration, it is likely that confirmation would never be sought where there is no dispute as to the contents of the award and where there is a solvent broker/dealer obligated to satisfy that award - *unless* the broker/dealer seeks confirmation in order to negotiate a lesser settlement with §768.73 as leverage.

to punitive damages. Accordingly, punitive damages were certainly within the contemplation of the parties when the contract was entered into. While this fact is extremely important in connection with the constitutional analysis previously provided to this Court in the *Initial Brief of Appellants*,[7] it is also relevant in this argument because a contract claim for punitive damages may result in an arbitration award which "need not actually be confirmed by a court to be valid." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). *See also, Initial Brief of Appellants*, pp. 31-39. The remaining decisions cited by the Department and the Appellees are irrelevant to the issue before this Court.

CONCLUSION

The legislature was deliberate in drafting Florida's Tort Reform Act to include terms known only in court and foreign in arbitration, including "*civil action*," "*remittitur*" "*additur*", "*jury*", "*court*", "*litigation*" and similar terms. It is clear that this Court must give these words their ordinary and plain meaning here as in *Acousti Engineering* and must conclude that FLA. STAT. §768.73 does not apply to arbitrations, arbitration awards or the arbitration process. Any decision to the contrary would run counter to the strong state and national policy advancing arbitration, which policy is in itself part of the solution to the problem identified to the legislature at the time of enactment of FLA. STAT. §768.73. The certified question from the

---

[7] The Mieles note in passing that a Georgia court recently ruled that Georgia's counterpart to Florida's Tort Reform Act, the Georgia Products Liability Punitive Damages Statute, GA. Code Ann. §51-12-5.1(e) violates the federal and state constitutions. That statute purported to give 75% of punitive damages awards in products liability cases to the state. The Court held that once a verdict is rendered, plaintiffs have a valid property interest in the judgment. *Moseley v. General Motors Corp.*, No. 90V6276 (Ga., Fulton County State Ct. Feb. 26, 1993).

United States Court of Appeals for the Eleventh Circuit, "Does FLA. STAT. §768.73 apply to arbitration awards?", should be answered "No".

Dated: Naples, Florida
June 21, 1993

GRADY & ASSOCIATES, L.P.A.
3411 Tamiami Trail North
Suite 200
Naples, Florida 33940
Telephone: (813) 261-6555
Facsimile: (813) 261-1192*

Attorneys for Petitioner-Appellant

Thomas R. Grady
Florida Bar No. 350702

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellants has been served by U.S. mail this 21 day of June, 1993 to John D. Boykin, Esq., Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, Northbridge Tower - 19th Floor, 515 North Flagler Drive, West Palm Beach, Florida 33401 and Bridget L. Ryan, Esq., Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350.

Thomas R. Grady
Florida Bar No. 350702

* Counsel does not consent to service of process by facsimile or other electronic means.